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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

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Nos. 3585-3586

J. P. BEELER, *Appellant*

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, doing business by and through Joseph B. Fleming and Aaron Colnon, as Trustees, *Appellee.*

PETITION FROM THE
UNITED STATES CIRCUIT COURT OF APPEALS
TENTH DISTRICT

PETITION FOR WRIT OF CERTIORARI
and
BRIEF OF APPELLANT

CLAUDE E. SOWERS,
Of Wichita, Kansas,
Attorney for Petitioner.

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PETITION FOR WRIT OF CERTIORARI

Comes now the petitioner, J. P. Beeler, and respectfully requests a review and that a writ of certiorari be

granted in a decree in the United States Court of Appeals, Tenth Circuit, in each of the above-entitled causes of action.

These causes concern prompt and orderly settlement of all disputes concerning rates of pay, rules, working conditions and disputes growing out of grievances and interpretation and application of grievances concerning rates of pay, rules, wrongful discharge and working conditions in collective bargaining agreements between individual employees and employers, under the Railway Labor Act of May 20, 1926, Title 45 USCA, Chap. 8, as further amended in 1934. Under Sec. 237b and 240a, Jud. Code, as amended February 13, 1934, May 22, 1938, Chap. 229, 43 Stat. 936, the Supreme Court of the United States shall be competent, upon petition of any party thereto, in any case, civil or criminal, in a Circuit Court of Appeals, whether government or other litigant, to require by certiorari, before or after judgment or decree by such lower court. That the causes be certified to the Supreme Court for determination. That Sec. 2, amended by Sec. 13 (b) of Act of May 20, 1926, Chap. 347, 44 Stat. 587, gives jurisdiction to the Supreme Court as to Railway Labor Act and is included among the cases of Sec. 239 and 240 of the Judicial Code, shall apply, Appendix to Supreme Court rules, Page 5 of the Revised Rules adopted February 13, 1939, amended March 25, 1940, October 21, 1940, May 26, 1941.

> "The Supreme Court has jurisdiction of all matters concerning Railway Labor Act as amended 1934, certified from the Circuit Court of Appeals for review and final determination." *Elgin, Joliet & Eastern R. R. Co. v. Burley,* 325 U. S. 711 and 761, 89 L. ed. 1886.

That on July 21, 1948, an opinion was rendered by the United States Court of Appeals, Tenth Circuit, affirming judgment in Cases No. 3585 and 3586, R. 122. That petition for rehearing was duly filed August 10, 1948, R. 123. That rehearing was by the Circuit Court of Appeals denied, August 17, 1948. That on August 30, 1948 mandates were by the United States Circuit Court of Appeals issued in accordance with the opinions and judgments, R. 127, and record duly certified by the Clerk of said Court on September 24, 1948, R. 127, and the same is now before the Supreme Court for review.

Petitioner, Beeler, brings these two actions, one for reinstatement of petitioner's job as Yardmaster with Rock Island railway at Wichita, Kansas, with full restitution of salary and seniority rating at Wichita as damages for wrongful discharge from that position or in lieu thereof damages based on his salary as Yardmaster for his life expectancy. The other action, he seeks judgment for alleged overtime compensation for hours worked in excess of eight hours per day as provided for in an agreement of May 20, 1944, from June 1, 1944 to June 17, 1946 and expense for his automobile. The cases were consolidated for trial, all based on collective bargaining agreements, contracts and the general purposes, intents and requirements under the Railway Labor Act pertaining thereto.

The summary of the matters involved embody the important issues of the findings of fact and conclusions of law of the District Court, as well as the statement of points upon which appellant relied upon appeal. They are substantially as follows:

1a. Are the January 1, 1938, February 3, 1939 and May 20, 1944 collective bargaining agreements inconsistent with or contrary to the aims, purposes and requirements of the Railway Labor Act?

1b. If the Rock Island required the petitioner, Beeler, to perform the duties of Yardmaster from January 1, 1938 to June 17, 1946, same consuming ninety per cent of his time as Agent-Yardmaster and the duties of supervising the Freight Agent's office which consumed ten per cent of his time, would not Beeler be classified as an employee under ExParte 72 of Interstate Commerce Commission Acts, 3374 Vo. 4, under heading of 'Routine Duties', to be consistent and meet the requirements of the intents and purposes of the Railway Labor Act?

1c. Would the defendant railroad be permitted to abolish Yardmaster job under collective bargaining agreement of February 3, 1939, without abolishing the duties of the said job, and require Beeler to continue to perform all of the duties of the same, as if it were not abolished, up to and including June 17, 1946, under the collective bargaining agreements of January 1, 1938, February 3, 1939 and May 20, 1944, and further deprive Beeler of his classification of Yardmaster under the said bargaining agreements, without being in direct conflict with the purposes, as well as the intents and requirements of the Railway Labor Act?

2. Can bargaining representative of the Yardmasters of America confer with Rock Island, employer, and negotiate and abolish a Yardmaster job of an individual employee under collective bargaining agreement of February 3, 1939, depriving said individual employee of his classification of Yardmaster under the said agreement, without petitioner's knowledge or notice to said

individual employee, thereby depriving him of protection to exercise his rights under the Railway Labor Act as to privileges under his seniority, without being in conflict with Article 13, Plaintiff's Exhibit 3, R28, 84, requiring thirty days written notice, and Para. 156, Title 45 USCA, Railway Labor Act, and further conflicts with petitioner's rights of due process under Fifth Amendment to Constitution of the United States?

3. Can Rock Island, as employer, confer with union bargaining representative on matters outside scope of authorization and without knowledge or consent of individual employee (Beeler), make material alterations in employee's status, bind said individual employee without the said employee being a party to said negotiations and without ratification of said changes by said employee?

4. If Beeler was considered Yardmaster, under the classification of employee as interpreted and designated under ExParte 72, ICC ruling of Railway Labor Act, by reason of performing the routine duties of said job, would Beeler not be subject to May 20, 1944 agreement and thereby be entitled to overtime pay under the eight hour day set forth in said agreement, effective June 1, 1944, to date of Beeler's discharge, June 17, 1946, as computed in Plaintiff's Exhibit 11, R. 54, 91?

5. If Beeler was an employee of Rock Island, subject to said bargaining agreements and the Railway Labor Act on June 17, 1946, by reason of performing all of the routine duties of Yardmaster at Wichita continuously for 29 years prior to date of his said discharge, designated by ICC rulings, ExParte 72 'Routine Duties', would not his discharge of employment without notice as set forth in collective bargaining agreement of May 20, 1944, Plaintiff's Exhibit 2, Article 12, R. 79,

by his employer, be a breach of said collective bargaining agreement and entitle Beeler to be reinstated and compensated for any loss, if any, less compensation in other employment, and damages for all time lost after June 17, 1946 as set forth in said Article 12 of agreement?

This petitioner believes that the above two cases should be reviewed by the Court for the following reasons:

1. That the Circuit Court of Appeals decided an important question of federal law, which has not been, but should be settled by this Court.

2. That the Circuit Court of Appeals decided a federal question in a way probably in conflict with applicable decisions of this court.

3. That the Circuit Court of Appeals has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

4. That the question of depriving employee of seniority rights is in substance depriving him of his personal property rights of due process and contrary to the Fifth Amendment of the Constitution of the United States.

WHEREFORE AND BY REASON OF THE FOREGOING, this petitioner prays that these actions will be certified from the Circuit Court of Appeals for review and final determination to the Supreme Court, and for such other and further relief as the Court may deem just, equitable and proper.

CLAUDE E. SOWERS
Attorney for Petitioner.

BRIEF

TESTIMONY OF BEELER, PETITIONER

Beeler, petitioner herein, worked for Rock Island railroad from *March 13, 1903 to June 17, 1946.* The employment was continuous. Beeler was appointed Yardmaster at Caldwell by Rock Island on December 31, 1907, transferred to Wichita, Kansas as Yardmaster, June 17, 1917, R. 24, from which date he performed all of the duties as Yardmaster at Wichita, Kansas, until June 17, 1946, supervising the yard and operating force. That on or about December 24, 1937, Brown and Franklin of Rock Island ordered Beeler to take over the extra duties of Freight Agent Lusk, who was retiring January 1, 1938, R. 25. Rock Island required Beeler to perform all of his duties as Yardmaster as he had in the past, Rock Island to pay Beeler *$20.00 per month* extra in addition to his regular Yardmaster salary, for performing Agent's duties, Beeler's chief duties to be Yardmaster, R. 26, 32. That Beeler used his automobile on company business and insured said automobile to protect company, R. 33. On January 1, 1938, a collective bargaining agreement was executed between Rock Island and the representatives of Yardmasters of America union, Plaintiff's Exhibit 3, R. 28, 81. On January 1, 1938, Rock Island, *in writing, assigned Beeler* in its regular bulletin from the operating office in Chicago, to the Yardmaster job at Cline Yard, Wichita, Kansas at a salary of $290.00 per month, R. 28, 87. At that time Beeler asked for Assistant Yardmaster to help him, R. 34. Beeler assumed and performed extra duties of Freight Agent as ordered but was required to perform all of

the duties of Yardmaster and if he failed to do so, under May 20, 1944 agreement, he forfeited all of his seniority rights as Yardmaster, Plaintiff's Exhibit 2, Article 7e, R. 27, 76. On January 7, 1939, Rock Island's Superintendent at El Reno, notified Beeler by bulletin his seniority at Wichita was transferred to Caldwell, Kansas, R. 29, Plaintiff's Exhibit 6, R. 30, 89. Beeler immediately made personal grievance to officials of Rock Island to no avail. He wrote letter to Mielke, President and General Chairman of Yardmasters of America, at Chicago, Defendants' Exhibit A, R. 37, 92, requesting he take the matter up with the authorities of Rock Island and have his seniority transferred back to Wichita in compliance with Plaintiff's Exhibit 3, R. 28, Article 3, R. 82. Beeler stated at this time in said letter that Agent's duties were assigned him in addition to Yardmaster duties, (Defendants' Exhibit A, R. 37, 92). Mielke secured a conference with F. H. Frey and negotiations were made and entered into on February 3, 1939. Rock Island sent a letter to Mielke, who accepted the same, said letter setting forth the transfer of Beeler's seniority back to Wichita, Kansas as requested, R. 28, 29, and in addition thereto, stated in said letter that Beeler was to be considered official of the company, not subject to agreement, Defendants' Exhibit B, R. 43, 94. After negotiations, regarding February 3, 1939, letter, Rock Island, through Superintendent Henderson, El Reno, sent a letter to Beeler reinstating his seniority at Wichita as requested *(but failing to mention that his Yardmaster job at Wichita had been abolished and that* Beeler was given official status, not subject to bargaining agreement), Plaintiff's Exhibit 4, R. 29, 88. Beeler was a member of the Yardmasters of America. An Agent-Yardmaster position was not considered an official position, R. 40.

Due to assuming of additional duties of Agent, Beeler was given title of Agent-Yardmaster and designated as subordinate employing officer, which was only change in his status of which he was informed, R. 72, Defendants' Exhibit D, R. 96, filed in U. S. District Court, August 11, 1947. Agent-Yardmaster was just a name, such as Agent-Operator but routine duties of Yardmaster prevailed as to his seniority, R. 48. Evidence shows that Beeler was never notified by Mielke or Rock Island that his status had been changed to that of official not subject to bargaining agreement, R. 47. During the 29 years he served as Yardmaster at Wichita, immediately prior to June 17, 1946, Beeler had been required to perform continuously all of the duties as Yardmaster at Wichita, Kansas. These duties consumed *ninety per cent of his time after January 1, 1938,* the remaining *ten per cent of his time was consumed by duties of freight agent,* for which Beeler received $20.00 per month additional, R. 45, 48, 49. The Court said:

> "The question under these contracts is whether he was a Yardmaster and performed most of his duties as Yardmaster." R. 48.

The evidence was that Beeler received increases in payroll as Yardmaster and only $20.00 per month straight time for agent's duties, R. 48, 49. Beeler performed all duties of Yardmaster during 1917 and World War I and period of World War II, December 7, 1941, up to June 17, 1946, *without any aid* or assistance. Wichita and Cline Yard *not a division point* on Rock Island, R. 43. Under collective bargaining agreement of January 1, 1938, Beeler was required to work twelve hours per day as Yardmaster, Plaintiff's Exhibit 3, Assignment, R. 28, 87. That under the agreement of May 20,

1944, he was required to work *eight hours per day,* Plaintiff's Exhibit 2, Article 8, R. 27, 76. That Beeler continued after June 1, 1944 to work same schedule of *twelve hours per day* as set forth in January 1, 1938 agreement, increasing same sometimes to twenty hours per day, R. 45. From the evidence, the Court concludes:

> "That he (Beeler) was paid as Agent-Yardmaster and he (Beeler) contended that most of his duties were as Yardmaster." R. 54.

Beeler made one to five trips from Wichita to Cline daily, a distance of over three miles and drove almost daily from one yard limit to the other, a distance of over eight miles of switch tracks and right of way in his duties of Yardmaster, R. 33. That Beeler personally supervised one engine and *three crews of five men each;* and four crews of five men each during the wheat harvest during month of August, R. 32, 41, 55. That he handled movements of trains in and through the yards, R. 42, 43. That Beeler on date of discharge, June 17, 1946, was never relieved as Agent-Yardmaster, only as Agent, R. 44, 89. He worked many days eighteen hours, seldom less than twelve hours, R. 45. Plaintiff discharged June 17, 1946, Plaintiff's Exhibit 7, R. 44, 89. The Court stated:

> "The only question is whether under collective bargaining agreement, he is Yardmaster or Agent." R. 52.

Beeler exercised his rights under his seniority as Yardmaster at Wichita on date of discharge, not knowing at the time that his Yardmaster job had been abolished by negotiations on February 3, 1939, Plaintiff's Exhibit 8, R. 44, 89. The Court said:

"It is a question of construction of contract or contracts." R. 51.

The Rock Island refused to permit Beeler to exercise his seniority as Yardmaster at Wichita, Kansas, Defendants' Exhibit C, R. 46, 95. The collective bargaining agreement states that Yardmasters will not be disciplined or *dismissed without hearing before Superintendent,* R. 47, Plaintiff's Exhibit 2, Article 12, R. 27, 79.

TESTIMONY OF G. E. MALLERY

G. E. Mallery was Manager of Personnel for Rock Island at Chicago and defendant, *Rock Island's only witness,* whose work consists of negotiating labor agreements under provisions of the Railway Labor Act and pertaining to handling with organizations, grievances arising under negotiated agreements and who had been so engaged since 1920, R. 55. That said Mallery participated in negotiating agreements of 1938, 1939, 1944 and 1947 for Rock Island. That the first written agreement was in 1927. That the first agreement was enactment of Railway Labor Act as amended June 1, 1934, also in 1935, R. 55. That the Transportation Act of 1920, established the Interstate Commerce Commission *as authority to designate employees,* subordinate officials and officials, employees and subordinate officials are entitled to representation by labor organizations and officials are not. That the Interstate Commerce Commission set out in ExParte 72, classifications of employees, subordinate officials and officials, including supervising agents. There was a Yardmaster position at Wichita, January 17, 1917 to February 3, 1939. *Beeler was the man wanted at Wichita, R. 56.* After 1935, labor agreements were negotiated with Rock Island Yardmasters which gave seniority to Yardmasters then employed

as such, R. 57. January 1, 1938 agreement provided that *seniority for Yardmasters should extend throughout the entire railroad;* in other words, *if a position was bulletined at Manley, Iowa, Beeler could have bid it in and could have been assigned to it had he been senior bidder* (had Beeler known job of Yardmaster was abolished February 3, 1939, with thirty-two years seniority, Beeler could have taken the opportunity to bid by bulletin any job on the system which his seniority rights would have qualified him under the 1938 agreement, but having no notice of the abolishment of the job of Yardmaster at Wichita, Kansas and continuing to perform the duties of the same, he was never given any opportunity to exercise his seniority rights under the 1938 agreement, because Rock Island wanted him at Wichita) R. 57.

> "We abolished the job at Wichita and *added the duties of Yardmaster to Agent.*" R. 57.

Agreement with Mielke that Beeler be Agent-Yardmaster as supervisor. He was not subject to bargaining agreement, R. 58, agreement in writing, Defendants' Exhibit B, R. 43, 94, signed by F. H. Frey and accepted by W. F. Mielke, shows on the face of it that Beeler was not a party to the contract, R. 59. Mallery:

> "Wichita wouldn't be considered a primary breakup or makeup yard." 59.
>
> "The practice of station agents supervising switching service at various points will not be changed or considered as affected by this agreement, but the practice will not be extended to points where yardmasters are now assigned for the purpose of displacing yardmasters." R. 60, Plaintiff's Exhibit 2, Article 1, R. 27, 77.

Mallery:

> "Not my prerogative to notify Beeler of February 3rd letter . . . not my obligation to notify him." R. 61.
>
> Q. Was this agreement (February 3, 1939) officially altered under the rules of collective bargaining by giving thirty days notice of a desire to change a particular status?
>
> A. (Mallery) Yes, Sir. (No thirty days notice was given Beeler of meeting of February 3, 1939, as required in collective bargaining agreement of 1938, Plaintiff's Exhibit 3, Article 13, R. 28, 87)
>
> Q. Have you got that notice?
>
> A. No, I don't have it. I don't have the whole file. I have the confirmation of it. (Never produced confirmation in evidence. R. 62).
>
> Q. Was any notice given to Mr. Beeler that it was held?
>
> A. No notice was necessary to him. R. 62.

Mr. Mielke was certified to Rock Island as authorized representative of the Yardmasters on the Rock Island railway, R. 62, 63. Mallery:

Letter of February 3, 1939, termed contract, R. 63. Yardmaster job officially abolished February 3, 1939. Job was abolished in Mr. Mallery's office between Mr. Frey and Mr. Mielke, authorized representative of Yardmasters of America, R. 63. Job of Agent was under agreement of February 3, 1939, R. 63.

> Q. And that is what you have created in the agreement of March 16, 1947?
>
> A. No, that is what was *created through the collective bargaining agreement of February 3, 1939*. R. 64.

Beeler's salary increased $20.00 per month.

Q. Wasn't there one at Herrington?

A. Yes, Sir, but he has no seniority rights to the position at Herrington or at any place on the Rock Island railway outside of Wichita, Kansas. *The 1938 agreement* gave Mr. Beeler and all other Yardmasters *system seniority rights.* The 1944 agreement took away from Mr. Beeler and all other Yardmasters system seniority rights and provides only for rights at individual yards. R. 65.

Mallery:

"Any place we had a Yardmaster on the date of this 1944 agreement, thereafter the Carrier was prohibited from abolishing the position of yardmaster and establishing the position of train master in the yard." R. 66.

Q. And the paragraph above.

A. 'The practice in the various yards in regard to the character of work permissible or duties assigned to positions filled by supervising officers (regardless of title), who may be in direct charge of various terminals, and which positions are not covered by this agreement, is recognized as proper.' R. 67 Plaintiff's Exhibit 2, Article 1, R. 27, 77.

Mallery denied that Beeler had been Yardmaster for thirty-nine years, including negotiated agreement of January 1, 1938, R. 67. Mallery:

"There was no Yardmaster position to protect." R. 67.

The Court said:

"If he is a Yardmaster the suspension didn't affect him under that order." R. 67.

Q. Performing ninety per cent of his duties as Yardmaster, and ten per cent as Agent?

A. Under the negotiated agreement, if he *did one hundred per cent yardmaster work,* it didn't make any difference. His authorized representative

agreed that his job was not covered by any labor agreement. R. 68.

Q. Could you show the Court by your records the order or the bulletin the company published at the time you abolished the job at Wichita, Kansas?

A. Yes, sir.

Q. Is that the regular, standard procedure in that instance where you abolish a job like Yardmaster at a station such as Wichita?

A. There wouldn't be any abolishing notice necessary, if you abolish the job by agreement with the General Chairman, as we did in 1938. (Negotiated on February 3, 1939.)

Q. That is the procedure you would exercise in anybody's case such as Mr. Beeler's case, would it not?

A. I don't believe the agreements of the Yardmasters call for any notice. (see Plaintiff's Exhibit 3, Article 13, R. 28, 84.)

Q. You didn't give him any notice?

A. I don't know.

Q. Is it customary with your railroad, where they do abolish a job, to give such notice?

A. That can be by agreement with the authorized representative. If you mean that we could go out and abolish a yardmaster job without saying anything to anybody that is not proper procedure. R. 69.

Beeler had his watch checked twice per month because he was connected with the movement of trains. R. 69.

Q. No notice was given to Mr. Beeler at all? This agreement was between you and the Yardmasters representative?

A. I don't know whether any notice was given him.

Q. Your record does not disclose it?

A. No, sir.

Q. You did not give any such notice?
A. No, sir.

Q. This relation of Agent-Yardmaster was created when?

A. ExParte No. 72 in February, 1921, following the Transportation Act of 1920, described the meaning of the term employee and subordinate officials. The Interstate Commerce Commission held hearings under ExParte No. 72 setting forth classifications of agent. The regular agents were covered by contract. The agents at important stations, where they still were not in charge of large, important stations, where they had *certain detailed work to do,* they were subordinate officials, and they are entitled to representation. (Beeler was in this classification.) At the larger and more important stations, they were designated and classed as supervisory officers not subject to the provisions of any contract . . . the Interstate Commerce Commission didn't designate who was an officer *but did say who were employees* and *subordinate officials."* R. 70

Mr. Cowick, President of Yardmasters of America on July 18, 1946, claimed to Rock Island that Carrier had violated Yardmaster agreement and *asked for restitution to Beeler of all time lost,* Plaintiff's Exhibit 10, R. 54, 90 (showing that the organization recognized Beeler as Yardmaster at Wichita and had no notice of the abolishment of job, not subject to any agreement.) R. 71. No similar Yardmaster job was abolished without notice. Many cases involving seniority but not job involving Yardmaster. (Beeler's request was for reinstatement of seniority only.) Beeler complained to Mr. Mielke that he wasn't properly treated in his seniority and Mielke handled it with F. H. Frey. R. 76.

No notice was received that job was abolished at Wichita. Beeler did receive notice from Superintendent Henderson that his seniority was restablished as requested, Plaintiff's Exhibit 4, R. 29, 88 (this being the only official letter from Superintendent Henderson regarding his inquiry). This could be the only source of information relative to the abolishment of the job and it can be seen from the content of the letter that there is nothing said regarding abolishment of Beeler's employment. (Petitioner believes that Superintendent Henderson had received no copy of February 3, 1939 agreement; instrument shows no copies sent, Defendants' Exhibit B.)

SUMMARY MATTERS TO BE TAKEN INTO CONSIDERATION

1a. The first summary matter to be taken into consideration is the inconsistency of the collective bargaining agreement of January 1, 1938, with the intents, purposes and requirements of the Railway Labor Act.

The Yardmasters of America and defendant, Rock Island railroad, executed and entered into a collective bargaining agreement, being effective January 1, 1938. This agreement in substance applied to all Yardmasters on defendants' railroad. Beeler, petitioner herein, had been duly appointed by the defendants and had been performing duties of Yardmaster for defendants over a continuous period of thirty-one years prior to date of said agreement, last twenty-one years at Wichita, Kansas. In Article 13 of said agreement, R. 85, the same states:

> " . . should either of the parties to this agreement desire revision or modification of these rules, thirty days written notice *shall be given such desire.*"

The Railway Labor Act, Title 45 USCA, Para. 156 states:

> *"Carriers and representatives* of employees *shall give at least thirty days written notice* of an intended change in agreements affecting rates of pay, rules or working conditions, etc."

The failure of notice under the Act has been defined by the Court as follows:

> "A failure of carrier to proceed as provided by this chapter leaves agreement with employees in force, and no wage cut may be imposed unless provisions of this chapter are first obeyed." *Chicago North Shore & M. R. Co.,* C. C. A. Ill. 1945, 147 F. 2d 723, *certiorari denied* 65 S. Ct. 1089, 325 U. S. 852, 89 L. ed. 1973.

The Federal District Court found that the petitioner herein had no notice whatsoever of the negotiations in collective bargaining agreement of February 3, 1939, Para. 7, R. 16. Article 13 of January 1, 1938 agreement does not set out that *notice shall be given in agreements affecting rates of pay or working conditions,* but only as to *rules* and petitioner believes that Article 13 conflicts with Para. 156, Title 45 USCA of the Railway Labor Act, inasmuch as the working conditions of the petitioner herein had been materially affected by February 3, 1939, collective bargaining agreement.

Petitioner further believes that the procedure used in executing the February 3, 1939, agreement was contrary to procedure set forth in the Act and also contrary to the collective bargaining agreement of January 1, 1938 and that said collective bargaining agreement of February 3, 1939, was thereby void, without force and effect, in changing the status of Beeler to that of official from Agent-Yardmaster. That all of the foregoing was inconsistent with and contrary to the intents, requirements and purposes of the Railway Labor Act as amended in 1934, and the rulings under ExParte No. 72 of the Interstate Commerce Commission.

The collective bargaining agreement of February 3, 1939, is inconsistent in the following respects: (1) In attempting to change the status of petitioner, Beeler, from employee to an official position. (2) In establishing his status not covered by a working agreement, Defendants' Exhibit B, R. 43, 94. That said collective bargaining agreement of February 3, 1939, was inconsistent with the intents, purposes and requirements of the Railway Labor Act for the reason that Beeler, petitioner, was deprived of his Yardmaster classification as employee, and was the only party concerned therein as an individual employee, *was not made a party to the said agreement,* and had not authorized W. F. Mielke to accept same as set forth in Defendants' Exhibit B, R. 43, 95.

The collective bargaining agreement of May 20, 1944, was inconsistent with the Act, in that petitioner, Beeler, herein had performed all duties of Yardmaster for the defendants at Wichita up to and including June 1, 1944,

effective date of said agreement and agreement stating, Article 1, Plaintiff's Exhibit 2, R. 27, 76:

> "The practice in various yards in regard to the character of work permissible or duties assigned to positions filled by supervisory officers (regardless of title), who may be in direct charge of various terminals, and which positions are not covered by this agreement, is recognized as proper, but, the practice will not be extended to points where yardmasters are now assigned to displace such yardmasters."

Petitioner, Beeler, was assigned Yardmaster at Cline Yard, January 1, 1938, by said defendants *under written assignment* at a fixed salary of $290 per month and twelve hour working day, Plaintiff's Exhibit 3, R. 87. There was nothing in the purported February 3, 1939 collective bargaining agreement which established a change in rates of pay, or working conditions, therefore, inasmuch as petitioner, Beeler, performed the routine duties of Yardmaster in their entirety, as Agent-Yardmaster *(regardless of title)*, it was not proper *to displace him as Yardmaster* because he had performed the duties of Yardmaster for defendants and therefore, said paragraph of said Article is inconsistent with the intents, purposes and requirements of the Railway Labor Act and ExParte rulings therein, as set forth in Title 45 USCA, Para. 151 (5) and 151 (a). Agreement further states therein:

> " . . . that *positions not recognized by this agreement are proper,*"

would be inconsistent with intents, requirements and purposes of the Act for the reason that it is retroactive in its content and directly in conflict with the purposes of collective bargaining agreements which has only to do with the future. The Court states:

> "To settle *for the future alone* without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract 'concerning rates of pay, rules or working conditions.' It includes the power to make a new agreement settling for future a dispute concerning the coverage or meaning of a preexisting collective agreement . . . But it *does not* cover changing them *with retroactive affects* upon accrued rights of claims. For it is precisely the difference between making settlements effective *only for the future* and making them *effective retroactively* to conclude rights claimed as having already accrued which marks the statutory boundary between *collective bargaining* and the *settlement of grievances*. The latter by explicit definition includes the 'interpretation or application' of existing agreements. To regard this as part of the collective bargaining power identifies it with making new agreements having only prospective operation." Section 739, *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 89 L. ed. 1903.

In said collective bargaining agreement, it further states:

> "That the practice of station agents supervising switching service at various points will not be changed or considered as affected by this agreement but the practice will not be extended to points where Yardmasters *are now assigned for* the purpose of displacing Yardmasters."

Petitioner Beeler was assigned duties of Yardmaster under written assignment of January 1, 1938 and if the said collective bargaining agreement of February 3, 1939 is of no avail and void, then petitioner Beeler was still assigned as Yardmaster at the time said collective bargaining agreement of June 1, 1944 was effective and cannot be displaced as set forth in said agreement. However, the inconsistency of this agreement with the Railway Labor Act is shown in view of the fact that petitioner, Beeler's *duties have always been that of supervising the switching service at Wichita,* Kansas . . . that being the duties of Yardmaster. The only supervisory job, according to the evidence in this case, was that Beeler *was supervising the Freight Agent's office* in addition to his Yardmaster duties. This petitioner believes, the said clauses in Article 1, Plaintiff's Exhibit 2, R. 76 thereby conflicts with the intents and purposes and requirements of the Railway Labor Act, as amended in 1934. The employee had always performed all of the duties of Yardmaster, in addition to supervising Freight Agent's office after January 1, 1938, and said collective bargaining agreement, in considering petitioner's position of Agent-Yardmaster not subject to collective bargaining agreement, would defeat the intents, purposes and requirements of the Act under collective bargaining, in not protecting Yardmaster, who continued to perform all of the duties of such position. Besides, Beeler was never a station agent. He was a Yardmaster supervising the duties of Freight Agent and was not in charge of the Wichita terminal, Para. 5, R. 15.

1b. The evidence shows that Beeler performed all of the duties of Yardmaster at Wichita from January 1, 1917 to June 17, 1946. That on January 1, 1938, under an oral order made by officials, Brown and Franklin of

defendant railroad, he was ordered to take on the additional duties of supervising the freight office upon the retirement of Freight Agent Lusk, R. 25, Defendants' Exhibit A, R. 37, 92. The evidence shows that the Yardmaster duties consumed *ninety per cent* of the petitioner's time as Agent-Yardmaster; that the added duties of supervising the Freight Agent's office was *ten per cent* of his time, R. 45, 68. That the salary of the petitioner for performing Yardmaster duties was *$280.00 per month* and that in accordance with the oral order, defendants paid Beeler an additional *$20.00 per month* for the performance of the additional duties of Freight Agent, R. 25, 57, 64, 87. This definitely showed that the petitioner's payroll should be classified as an employee under ExParte 72 of the Interstate Commerce Commission rulings, 374 Vol. 4 under heading of *'Routine Duties'*, in order to be consistent and meet intents, purposes and requirements of the Railway Labor Act, as amended in 1934. The evidence clearly shows that Beeler's *former employment as Yardmaster never ceased*. Mr. Mallery, representative of Rock Island and the only witness in this case for defendants, evidence showed petitioner was required to perform all of the duties as Yardmaster in addition to that of Freight Agent,

> "We abolished the job at Wichita and added the duties of Yardmaster to Agent," R. 57.

Mr. Mallery refers many times to ExParte 72 of the Interstate Commerce Commission which, he testified, is a controlling factor to employees, subordinate officials and officials, R. 70. From his evidence alone, it conclusively shows that the petitioner, Beeler's classification should be that of Yard-master, inasmuch as the

Yardmaster duties were his routine duties. This is established by the fact that *ninety per cent of his duties* were Yardmaster and *ninety per cent of his salary* was that of Yardmaster. ExParte 72, R. 121, see 3374 ICC Annotated, Vol. 4 states:

> "The duties and responsibilities of supervisory station agents vary so widely that they cannot all be consistently designated subordinate officials. This class will be subdivided, therefore, as follows:
>
> "(a) Routine Duties. *Supervisory station agents,* who, in addition to their supervisory duties, are required to perform work usually performed by telegraphers, telephone operators, ticket sellers, bookkeepers, towermen, levermen *or similar routine duties are employees* and although they may have supervision over one or more other station employees, cannot be properly designated subordinate officials."

Mallery testified where agents are at important station, but not in charge of large important stations, where they have certain detailed work to do, they are subordinate officials and entitled to representation and collective bargaining agreement, R. 70. Certainly Beeler is in this classification. Mallery also testified that Beeler received $20.00 per month in addition to his Yardmaster salary which was $280.00 per month. Beeler signed his employment application, Form G126 on January 3, 1938, Defendants' Exhibit D, 96, as "Subordinate Employing Officer", the same approved by Henderson, Division Superintendent, showing that Beeler's rank was under that of Division Superintendent. Under 266 I. C. C. 57, the Commission states:

> "Generally speaking, railroad employees *below the grade* of Division Superintendent are consider-

ed to be *subordinate officials or employees* as the case may be."

The Federal District Court or the Court of Appeals has no authority to define Beeler as an official and the Court says:

> "Every person in service of a carrier is not an 'employee' within subsection (5) of this section and 152 (4, 9) of this title, though subject to carrier's continuing control and authority, but only those *who perform work defined as that of an employee* by existing or amended orders of Interstate Commerce Commission, and the authority thus to define employees is *not vested in National Mediation Board, nor courts." Natl. Council of Ry. Patrolmen's Unions v. Sealy,* C. C. A. Tex, 1945, 152 F. 2d 500.

It is desired that the Court particularly notice that this employment form did not include a statement of any character that the Agent-Yardmaster position approved by Division Superintendent Henderson was an official position at that time (January 3, 1938). Again in the Nashville, Tennessee case, 264 I. C. C. 315-317, the station master and assistant station master position were to be determined as to whether or not they were subordinate officials, subject to collective bargaining agreements, or officials. This station master supervised six switching crews, had charge of the Union Station building at Nashville, Tennessee, had three assistant station masters, one extra assistant station master, three mail supervisors, 110 mail handlers, 4 clerks, 6 gatemen, 3 elevator operators, one custodian and 21 station cleaners, all of whom he supervised. He also supervised the passenger train operations, the breaking up and making up of passenger trains at Nashville, Tennessee. Nash-

ville, Tennessee was considered by the Commission as a large and important station and switching center, and the respondents argued that the station master and assistant station masters were vested with authority and responsibilities that stamp them as officials. On Page 318, the Commission stated:

> "The record supports the conclusion and we find that the work of the aforesaid stationmaster and assistant station masters meets the description of that of subordinate officials . . . and section 1 (5) (Title 45 U. S. C. A., Para. 151) of the Railway Labor Act should be amended to include the work of the aforesaid stationmaster and assistant stationmaster."

This clearly contradicts Mallery's testimony: "where they still were not in charge of large important stations", and is a statement in direct contradiction of the I. C. C. ruling in the Nashville, Tennessee case. It is therefore clear that the petitioner's duties could not possibly be as important as the duties in the Nashville, Tennessee case. Therefore, at the most, the petitioner herein would be a subordinate official, if not an employee of the said defendant railroad and therefore, at the time of his discharge, June 17, 1946, would be subject to the terms of the collective bargaining agreement of June 1, 1944. Designating the petitioner, Beeler, an official would be inconsistent with and could not meet the requirements, purposes and intents of the Railway Labor Act as amended in 1934.

> "The provision of subsection (Fifth) of this section authorizing Interstate Commerce Commission to define and classify the work of an employee or subordinate official apart from the work of executives and officials to the end that the status of each under this chapter shall be determined by the

character of his work is unambiguous, so that there is no room for construction." *Brotherhood of Locomotive, Firemen & Enginemen v. I. C. C.,* 1945 147 F. 2d 312, 89 L. ed. 1981.

"The power of the Interstate Commerce Commission under subsection (Fifth) of this section is limited to determining whether an admitted wage-earner of an admitted carrier is to be classified as an employee, a subordinate official, or an official." *infra.*

Employees, under the Railway Labor Act, Title 45 U. S. C. A., Para. 151 (5) and 151 (a) are necessarily given salary classifications due to their routine duties as set forth in I. C. C., ExParte 72. The petitioner therefore believes that he is entitled under collective agreement to classification of Yardmaster. The Court has said:

"Under collective bargaining agreement concerning employment of train dispatchers, railroad was not obligated to create or reestablish any particular position and employees rights would be invaded only when he failed to receive the payroll classification to which he was entitled by reason of the duties performed." *Crowley v. Del. & H. Ry. Corp.,* 63 Fed. Supp. 164.

The collective bargaining agreement of February 3, 1939 was null and void. The Court says:

"Any sanction of individual agreements contrary to terms of collective agreement between carrier and employees should not be permitted under this chapter." Order of R. R. Telegraphers v. Railway Express Agency, D. C. Ga. 1942, 55 F. Supp. 319, Reversed 137 F. 2d 46, reversed 64 S. Ct. 582, 321 U. S. 342, 88 L. ed. 788.

The Court goes on to say:

> "A collective agreement between employee and employer is not a local matter, because of the subject matter and federal legislation touching it, a Federal court is bound to exercise independent judgment and the Supreme Court of the United States has final authority . . . Seniority provisions of the collective agreement is an important and valuable part of individual contract of employment made thereunder, which union cannot waive or destroy." *Ill. Cent. Ry. Co. v. Moore,* 112 Fed. 2d 959.

1c. The petitioner Beeler herein, worked continously, performing all of the duties of Yardmaster for 31 years immediately prior to January 1, 1938. Under the oral order, he was given on that date, additional duties as Freight Agent in the same office in which he had been Yardmaster for the past 21 years, which additional duties consumed approximately ten per cent of his time. Mr. Mallery testified that Mr. Beeler *was required* by defendants to perform all of the duties of Yardmaster in addition to those of Agent from January 1, 1938. Not only was he required to perform all of the duties, but he was also assigned Yardmaster duties under written assignment, Plaintiff's Exhibit 3, R. 28, 87, at a stipulated amount of $290.00 per month in the Cline Yard, twelve hours per day. Now the question before us is *if Mr. Beeler, the petitioner, was required by defendant employer to perform all of the duties of Yardmaster as he had in the past, under the law, could Rock Island abolish the Yardmaster job, unless they abolished the duties,* without defeating the purposes of the Railway Labor Act. The Court says on the matter of work performed:

> *"Performance and not existence of the duties is the essential preface to railroad's obligation under the collective bargaining agreement* to reclassify train dispatcher and to dispatcher's right to maintain action under Railway Labor Act, his legal rights must be determined in accordance with the law of contracts and plaintiff must establish that employer breached bargaining agreement; majority of duties performed as dispatcher rules as to his classification and railroad cannot deprive dispatcher of job." *Crowley v. Del. & H. Ry. Co.*, 63 F. Supp. 162, 164.

In this case, dispatcher had not performed the duties of dispatcher. The fact that the duties existed and were not performed, did not give the dispatcher the privilege to be reclassified inasmuch as he had never performed the duties. In *Hanks v. Del. & H. Ry. Co.*, 63 Fed. Supp. 161, the plaintiff had performed the duties of dispatcher and therefore, the court held that he should be reclassified as dispatcher under payroll classification as such. It is the petitioner's belief that the performance and not the existence of the duties is the essential preface to the railroad's obligation under collective agreement and where the petitioner continued to perform all of the duties of Yardmaster, and was a member of Yardmasters of America from the union's inception, that it cannot be said that he is not entitled to the payroll classification of Yardmaster and employee in the defendants' employment herein. Otherwise, it would defeat the very purposes, as well as the intents and requirements of the Railway Labor Act and deprive this petitioner of his rightful classification of Yardmaster under the said agreement.

2. The petitioner wrote a letter to Mr. Mielke, general chairman of Yardmasters of America at Chicago, Defendants' Exhibit A, R. 37, 92, and requested of him that his seniority be changed as Yardmaster from Caldwell, Kansas to Wichita, due to a listing in a bulletin from Superintendent Henderson's office, *January 30, 1939*. Back in January, 1939, the petitioner stated that he was ordered to perform Agent's duties January 1, 1938, in addition to Yardmaster duties. The only request that petitioner made in this letter to Mr. Mielke was that he straighten out his yardmaster seniority. Mr. Mielke conferred with the defendants, employer, and in a negotiation, *the pretended collective bargaining agreement of February 3, 1939 was negotiated*. This agreement in substance attempted to deprive this petitioner of his classification of Yardmaster under the collective bargaining agreement of January 1, 1938, and to abolish the position in its entirety. The Court says:

> "This chapter places upon carriers and employees duty of exerting every reasonable effort to settle disputes by agreement *and prohibits carrier from altering rates of pay, rules or working conditions except in manner provided by agreement* or by this chapter." *Shipley v. Pittsburgh & L. E. R. Co.*, 70 F. Supp. 870.

As stated before, the defendants and representatives of the union, without knowledge, authorization, ratification or notice to this petitioner, an individual employee Beeler, agreed to collective bargaining agreement regarding individual employment of employee, this petitioner never being permitted to be a party to the same. Mr. Mielke accepted the same in behalf of this petitioner without any ratification from him, Defendants'

Exhibit B, R. 43, 95. That this deprived the petitioner of the protection of his rights under the Railway Labor Act, as to privileges of his seniority and conflicted with the procedures set forth in Article 13, Plaintiff's Exhibit 3, R. 28, 84 and Title 45 U. S. C. A. Para. 156, requiring thirty days written notice for changes of rates of pay and working conditions, the petitioner being deprived of his right of conference in his individual employment, and the Court says:

> "The right of conference by individual with employer under this chapter includes right to confer as an individual concerning claims that railway has failed to perform the individual's contract in which the right is embodied." *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pac. Co. v. Southern Pac. Co.*, C. C. A. Cal. 1943, 132 F. 2d 194, 88 L. ed. 85.

It also deprived this petitioner of the right to protect his seniority, which is a personal property right, as interpreted, under due process and contrary to the Fifth Amendment of the Constitution of the United States. As to employee's seniority rights, although arising under collective bargaining agreement between employee union and employer, the Court states:

> "That an employee's seniority rights are individual employee's exclusive property and constitute property within the Fifth Amendment of the Constitution of the United States." *Primakow v. Railway Express Agency*, 56 F. Supp 413.

3. Mr. Mielke had no authorization to negotiate or confer with defendant railroad herein regarding any matter other than the reestablishment of petitioner's

seniority as Yardmaster at Wichita. Defendants' Exhibit B, R. 43, 94, a letter of February 3, 1939, collective bargaining agreement, *was never marked copy to Beeler,* as were all the other letters, Plaintiff's Exhibit 4, R. 29, 88. The Court has stated in 31 Am. Jr. 102, page 874, regarding modification of contract of employment:

> "It has been ruled that agreements between organizations of employees and their employers are not designed to place it within *the power of the organization to change or modify* the contract at pleasure, so as to affect injuriously the individual rights of its members theretofore secured by the agreement. This ruling is predicated upon the theory that the officers of labor unions *are not to be deemed the agents of the members,* so as to be able *to affect their individual rights.* Nor is the submission of questions involving such rights contemplated by the agreement of members of a union to comply with its rules and regulation and with the will of the lawfully constituted majority."

The Court goes on to say regarding collective agreements as to individual employee status, that they are to be considered as follows:

> "The terms of the collective agreement, as included in an individual labor contract, ought not to be construed narrowly and technically, *but broadly, as to accomplish its evident aims and protect both the employer and employee.* It has been held that such contracts are to be construed precisely as contracts between individuals." 31 Am. Jr., Para. 113 Page 878.

It is therefore believed by the petitioner that he should have been made a party to the collective bargaining

agreement of February 3, 1939, for the reason that the entire negotiation involved his employment as a single, individual employee and therefore, if he were not a party to the contract he could not be held responsible for the results of the negotiation any more than any other individuals who contract between themselves. It is also noted that he was not a party to the contract, Defendants' Exhibit B, R. 43, 94, nor does his name appear on the contract. The Supreme Court held as follows:

> "The fact that a union participates in negotiations with employer, *does not warrant a conclusion,* that a union was finally authorized by railroad employees to settle their grievances with their employer, *without employee concurring in any agreement settlement." Elgin, Joliet & Eastern Ry. Co. v. Burley,* 89 L. ed. 1886.

This was a minor dispute involving a grievance between the petitioner herein and the railroad employer. The Court has stated as follows:

> *"The so-called minor disputes,* on the other hand, *involving grievances,* affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or *arise incidentally in the course of an employment.* They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so . . . Broadly, the statute as amended marks out two distinct routes for settlement of the two classes of dispute, respectively, each consisting of three stages. *The Act treats the two types of dispute alike in* requiring *negotiations as the first step toward* settlement and therefore in contemplating voluntary action for both at this stage, in the sense that agreement is

sought and cannot be compelled. To induce agreement, however, the duty to negotiate is imposed, for both grievances and major disputes." infra, Sec. 724, page 1895.

In this case, *it was a minor grievance relative to seniority classification at Wichita and change of status of individual employment.* The Court goes on to say; *infra,* Sec. 733, page 1899:

> "Accordingly, petitioner urges that the statute, both by its terms and by its purpose, confers upon the collective agent the same exclusive power to deal with grievances, whether by negotiation and contract, or by presentation to the Board when agreement fails, as is given with respect to major disputes. And the aggrieved employee's rights of individual action are limited to rights of hearing before the union and possibly also by the carrier.
>
> "We think that such a view of the statute's effects, in so far as it would deprive the aggrieved employee of effective voice in any settlement and of individual hearing before the Board, *would be contrary to the clear import of its provisions and to its policy.*
>
> *"It would be difficult to believe* that Congress intended, by the 1934 amendments, to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation, but also in giving effect to them and to all other incidents of that relation. Acceptance of such a view would require the clearest expression of purpose. For this would mean that Congress has nullified all pre-existing rights of workers to act in relation to their employment, including perhaps even the fundamental right to consult with one's employer, except as the collective agent might permit."

This is exactly what Mr. Mielke, of the Yardmasters of America, and Mr. Frey of Rock Island employer did in this case. They took it entirely out of the hands of Mr. Beeler and decided to settle the matter themselves without any notice or knowledge to Mr. Beeler whatsoever. In fact, the Rock Island went so far as to have Mr. Henderson, Division Superintendent, send a letter to Mr. Beeler, Plaintiff's Exhibit 4, R. 29, 88, which contained the name of Mr. Frey, acknowledging receipt of Mr. Beeler's letter, designating seniority as the subject and stating as follows:

> "We are arranging to carry Mr. Beeler on seniority roster at Wichita as Yardmaster with date of December 31, 1907."

Also Mr. Beeler received Plaintiff's Exhibit 6, R. 30, 89, a revised and corrected Yardmaster seniority list of the Oklahoma Division. Mr. Henderson requesting that receipt be acknowledged and advise if the point and date shown for him was correct, Plaintiff's Exhibit 5, R. 29, 88. Copy of this also was sent to Mr. Frey. In neither of these Exhibits did the defendant employer *in any manner show or indicate that anything other than the adjustment of petitioner's seniority had been negotiated at Chicago.* Defendant *sent no copy of collective bargaining agreement of February 3, 1939 to petitioner,* as they did other letters. Therefore, after receiving Plaintiff's Exhibit 4, 5 and 6, and his seniority had been shown at Wichita instead of Caldwell, he believed his position as Agent-Yardmaster had been readjusted to former status of January 1, 1938, and having no notice of the abolishment of his job or the fact that he was not subject to collective bargaining agreement, did not know that said job was abolished at the time of

his discharge, June 17, 1946, as he testified, R. 73. Considering the petitioner, Beeler's, contract of employment with defendant railroad as a contract between individuals, the Court has held there must be a right of conference.

> "Rights of conference are not identical with rights of settlement. But the purpose of conference and the duty to treat is to bring about agreement. The right and the obligation to share in the negotiations are relevant to their aim. Conceivably the statute might confer the right to participate in the negotiations, that is, to be heard before any agreement is concluded, either upon the collective agent or upon the aggrieved employee or employees, at the same time conferring upon the other the final voice in determining the terms of the settlement. That is, in effect, the position taken by each of the parties in this case. But they differ concerning where the final say has been vested.
>
> *"His rights, to share in the negotiations, to be heard before the Board, to have notice, and to bring the enforcement suit, would become rights more of shadow than of substance if the union, by coming to agreement with the carrier, could foreclose his claim altogether at the threshold of the statutory procedure.* This would be true in any case where the employee's ideas of appropriate settlement might differ from the union's." *Elgin, Joliet & Eastern R. Co. v. Burley,* 89 L. ed. 735-1901.

There could be no way in which the defendant railroad employer and the Yardmaster representative could effectively negotiate contrary to the authorization of this petitioner. The Court goes on to say:

> "Congress made no effort to deal specifically with these variations. But whether or not the collective agent has rights, independently of the ag-

grieved employee's authorization, to act as representative of the collective interest and for its protection in any settlement, whether by agreement or in proceedings before the Board, *an award cannot be effective as against the aggrieved employee unless he is represented individually in the proceeding in accordance with the rights of notice and appearance or representation given to him.* Those rights are separate and distinct from any the collective agent may have to represent the collective interest." *Infra,* Sec. 738, Page 1902.

In protection of individual employee rights under collective bargaining, the Court further states:

> *"The collective agreement could not be effective to deprive the employees of their individual rights.* Otherwise those rights would be brought within the collective bargaining power by a mere exercise of that power, *contrary to the purport and effect of the Act* as excepting them from its scope and reserving them to the individuals aggrieved. In view of that reservation *the Act clearly does not contemplate that the* rights saved may be nullified merely *by agreement between the carrier and the union.*
>
> "Nor can we say as a matter of law that the mere making of *complaints through local Brotherhood officials amounted to final authorization to the union to settle the claims* or represent the employees before the Board. Neither the statute nor the union's regulations purported to give these effects to that conduct . . . More than this would be required to disclose unequivocal intention to surrender the individual's right to participate in the settlement and to give the union final voice in making it together with exclusive power to represent him before the Board." *infra,* Sec. 744, page 1905.

The Court further said relative to notice of negotiations:

> " . . . since it is conceded also that *they were not given notice* of the proceedings *otherwise than as the union had knowledge of them;* and since further they have denied that they had knowledge of the proceedings and of the award was effective in any manner to affect their rights must be determined in the further proceedings which are required. The crucial issue in this respect, of course, will be initially *whether respondents had authorized the Brotherhood in any legally sufficient manner* to represent them, individually, in the Board's proceedings in Docket No. 7324." *Elgin, Joliet & Eastern Ry. Co. v. Burley,* 89 L. ed. Section 748, page 1908.

The position taken by the defendant Rock Island as determined by Mr. Mallery's testimony is that the representatives of the union are the only parties with which he can settle disputes of employment or on individual contracts. He says:

> "We just cannot and do not, under the law, deal with an individual employee. We have to deal with his authorized representative, under the law, and Mr. Mielke was certified to the Rock Island railroad as the authorized representative of the Yardmasters on the Rock Island Railway. If Mr. Beeler walked into my office and said that he wanted to take a reduction in his salary, I couldn't do that. He didn't have any right except such as he received from the negotiated contract." R. 62.

The Court relative to union binding individual employee, has said as follows:

"Upon the theory that a union is not an organization for the purpose of conducting any business enterprise, it has been held that a union, as an organization, *cannot make a contract for its individual members in respect of the performance of work and payment for it,* and that contracts entered into by officers of the union *are not binding upon the individual members in the absence of a relation of agency* between the officers and members, or a ratification of the contract. The officers of a *union cannot create, either by work or contract, a binding bargain in behalf of the members of their union to furnish labor to be individually performed, unless they have been authorized by the members.*" 31 Am. Jr. 99, page 873.

The Court further states:

"The terms of a collective bargaining agreement between the Carrier and its employees under the Railway Labor Act of 1926, cannot be suspended or expanded by contract with individual employees, even though such individual contracts are only with a few employees specifically or uniquely situated.

"The company contends that special voluntary individual contracts as to rates of pay, rules and conditions of employment may validly be made, notwithstanding the existence of collective agreement, and the terms of the individual agreements supercede those of the collective bargaining one.

"If this were true, statutes requiring collective bargaining would have little substance for what was made collectively could be promptly unmade individually. It is said, the collective agreement affects relative few agents, and that those are specifically and uniquely situated. This apparently true, for application of collective agreement results in award of $40,000.00 to one agent over a period and

less than $2,000.00 to all others. But the company did not observe the representatives of the whole unit to be notified, and dealt with concerning a matter from which an employee's point of view may not be exceptional or which may provide a language for taking away other advantages of collective contract." *J. J. Case Co. v. N. L. R. B.*, 321 U. S. 332.

The Court further states:

"We hold that failure of carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective bargaining agreement in force throughout the period and the Carrier's efforts to modify its terms through individual agreements are not effective" *R. R. Tele. v. Railway Express Co.*, 88 L. ed. 788.

The Court further states:

"The unions, apparently, like petitioner in this case, interpret the Act as *not contemplating two distinct systems* for the settlement of disputes, *one wholly collective for major disputes, the other wholly individual for minor ones.* In this view the collective agent becomes a party to the collective agreement by making it and its interest as representative of the collective interest does not cease when that function ends. It remains a party to the agreement, as such representative, after it is made; and consequently, in that capacity and for the protection of the collective interest, is concerned with the manner in which the agreement may be interpreted and applied." *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 89 L. ed. 724, page 1895.

Petitioner Beeler's case certainly was within the classification of grievance and not major dispute and therefore, should be treated as an individual contract between the

railroad and Mr. Beeler. It is therefore believed by the petitioner that the collective bargaining agreement of February 3, 1939, was void and of no effect inasmuch as Beeler was not made a party to the contract at the negotiations, the same being carried on by Mielke, general chairman of Yardmasters of America, and Rock Island, employer. If this is the case, then Mr. Beeler's employment as Yardmaster was certainly continuous and authorized under assignment of January 1, 1938, Plaintiff's Exhibit 3, R. 28, 87, and employment as Yardmaster was in full force on June 1, 1944, the effective date of the last collective bargaining agreement under which Mr. Beeler was employed, having been discharged on June 17, 1946. Therefore, said collective bargaining agreement of 1944 is inconsistent with and contrary to the requirements, aims and purposes of the Railway Labor Act as interpreted. The Court states as follows:

> "But the drastic effects in curtailment of his pre-existing rights to act in such matters for his own protection would be most obvious in two types of cases: one, where the grievance arises from incidents of the employment not covered by a collective agreement, in which presumably the collective interest would be affected only remotely, if at all; the other, where the interest of an employee not a member of the union and the collective interest, or that of the union itself, are opposed or hostile." *Elgin, Joliet & Eastern Ry. Co. v. Burley,* 89 L. ed. 736, page 1901.

This petitioner believes that he comes in the first type of cases, that where grievance arises from incidents of employment, which pertains to the pay and working conditions of the individual employee. It is therefore

believed by this petitioner that the defendant Rock Island and the bargaining representative of the Yardmasters *acted outside the scope of their authorization or consent of Beeler, the individual employee* and without his knowledge and made material alterations in employee's working conditions and status with said employer, attempting to bind said individual employee without said individual employee being a party to said negotiation and without ratification of said changes by said employee. This, the petitioner believes, transgresses the rights and privileges of said employee and defeats the entire purpose of the Railway Labor Act in protecting the said employee under the collective bargaining agreements.

4. Petitioner, Beeler, was employee of Rock Island on June 17, 1946 and inasmuch as a majority of his routine duties were that of Yardmaster at Wichita and had been continously for twenty-nine years prior to said date, petitioner was entitled to notice and hearing, as set forth in Article 12, Plaintiff's Exhibit 2, R. 27, 79, by his employer. That since he was not given proper notice and hearing of his grievance on the date of discharge, the said Rock Island *employer breached the said collective bargaining agreement* of May 20, 1944 and said petitioner, Beeler herein, *should be reinstated and compensated for any loss,* if any, as result thereof in employment after June 17, 1946, as set forth in said Article 12 of said agreement. First, the employee has a right to bring an action against the employer, as the Court states:

> "Employee *makes prima facie case* of showing *collective bargaining agreement, existence of duties of position, its abolishment* and *continuing of such duties as same office,* this constitutes a breach of

collective bargaining agreement entitling employee to relief in view of evidence of continuance of duties of such position." *Hanks v. Del. & H. Ry. Corp.*, 63 F. Supp. 161.

The defendants contention is that they had a *right to discharge* petitioner herein *because he was an official,* and petitioner's contention is that *he was an employee or subordinate official.* The Courts have said in this regard:

> "Under the Act, railroad who has a contract with union could *not discharge employee at will,* where the contract contained stipulation that *cause of discharge should be stated and hearing given,* implying that discharge was not to be had at will but only for just cause, of which railroad *officers were not the sole and final judges." Ill. Cent. Ry. Co. v. Moore,* 112 F. 2d. 959.

The Court further states in this respect:

> *"No employees coming under collective agreement should be dismissed or suspended without sufficient cause,* and complaint should be investigated, *restitution should be made* when action had been taken contrary to contract in force, employees coming under it had their tenure and rights governed by its terms, and for action contrary thereto had a right of action to redress their grievances, for purpose of passing on question whether plaintiff stated a cause of action, all well pleaded facts of petition were required to be taken on time." *System Fed. No. 59, etc. v. La. & H. Ry. Co.,* 30 F. Supp. 909, 119 F. 2d. 509

There was no opportunity for the petitioner Beeler to present his side of the case when he was discharged on June 17, 1946, by defendant employer. *He was given no*

opportunity to defend his means of livelihood and the Court says in this respect:

> "No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law. The case at bar illustrates how a single employee may be caught between the upper and nether millstones in a controversy to which only a labor organization and courts are parties before the Board. *It is necessary for an employee to be named a party to the proceeding* before the Board involved in the controversy within the meaning of the law. Notice should be given in some adequate way to all persons who will be substantially affected by the order that may be entered by the Board unless notice is waived." *Estes v. Union Terminal Co.,* 86 F. 2d. 768.

The petitioner, Beeler, was never given an opportunity to enter into these negotiations with defendant employer. Certainly, he should have been given this privilege to protect his rights after 43 years service with the employer. In the Interstate Commerce Commission rulings, ExParte 72, termed 'Routine Duties', as set forth above, this petitioner believes there is no way in which this petitioner could be designated in an employment classification *other than that of employee* for said defendant employer, and at most, a subordinate official.

ExParte No. 72, I. C. C. Acts Annotated, Vol. 4, p. 3374:

> "(a) Routine Duties. Supervisory station agents who, in addition to their supervisory duties, are required to perform work usually performed by telegraphers, telephone operators, ticket sellers, bookkeepers, towermen, levermen, or similar rou-

tine duties are employees and, although they may have supervision over one or more other station employees, cannot be properly designated subordinate officials."

This is the question upon which the entire case hinges. If petitioner, Beeler, is an employee or subordinate official, according to testimony of Mr. Mallery of defendants, then he is subject to collective bargaining agreement regardless of the attempted abolishment and establishment of his official status in the February 3, 1939, collective bargaining agreement, by reason of the fact that said agreement would therefore be *contrary to the I. C. C. rulings,* under the Railway Labor Act, and therefore, contrary to law and void ab initio.

In computing the damages for loss of employment, petitioner Beeler's salary as Yardmaster was $361.87 on date of his discharge June 17, 1946, and computing up to October 17, 1948, his loss by reason of discharge, from employment would amount to $10,132.36 and $361.87 per month thereafter until restitution is made by the defendants, or in lieu thereof, if not permitted to return to employment, petitioner, Beeler's age being 65 with a life expectancy of 11.10 years, and due to the fact that under seniority rules on defendants railroad and other railroads, plaintiff would be unable to get similar employment, with loss of future earnings of 11.10 years, his life expectancy, at $361.87 per month or a total of $40,049.81. The testimony clearly showed that petitioner was physically able to hold down job of Switchman, R. 187, therefore, in the alternative, if the court decides on the life expectancy and payment for all time lost, petitioner's loss of future earnings are set forth above.

5. Mr. Beeler was considered Yardmaster, as far as all of the duties of the same were concerned at Wichita for 29 years continuously prior to his discharge June 17, 1946. He served under the written assignment of January 1, 1938, under the collective bargaining agreement of said date up to June 1, 1944, when he served under collective bargaining agreement of that date. This petitioner believes that the February 3, 1939 collective bargaining agreement is of no effect and void because it is contrary to the Railway Labor Act and I. C. C. rulings under ExParte 72 under said Act, and therefore, Mr. Beeler, being subject to collective bargaining agreement effective June 1, 1944, is entitled to overtime pay under the eight hour day set forth in said collective bargaining agreement, to date of petitioner's discharge as computed in Plaintiff's Exhibit 11, R. 54, 91, which as computed, amounts to approximately $9,620.80.

REASONS

1. The Circuit Court of Appeals decided an important question of Federal law which has not been settled by this Court. First, states in its opinion:

> "Conversely, apart from his automobile expense, he has no right of action outside the contract, and his discharge without a hearing was not an actionable wrong", R. 118.

The Court then cites *Littel v. Evening Star Newspaper Co.,* 120 F. 2d 36. This, however is a case wherein it does not apply to a railroad and therefore, has no significance under the Railway Labor Act. The Court further goes on to say:

> "The statute does not draw the line or prescribe the boundaries between *the collective interest* in which the bargaining representative *is authorized to act for the employee* and *the individual interest in which the employee is entitled individual representation with notice and opportunity for hearing.* Nor have the courts found *a ready formula for delimiting such authority.*" R. 119.

It is the petitioner's belief that *this Court should prescribe the boundary between collective and individual interests* and develop a ready formula for delimiting such authority on the part of the employer, by settling the matter in this court, such matters having been before the Court, *Elgin, Joliet & Eastern Railway Co. v. Burley,* 89 L. ed. 1886. This important question appeared to the petitioner to be satisfactorily covered in the above cited case, however, due to the importance of the question involved regarding the individual interest of an employee and in his representation and notice in individual employment negotiations, it is certainly a right which should be determined to safeguard the protection for the individual employee under his contract of employment with employer under the Railway Labor Act, as amended in 1934.

2. It is believed by this petitioner that the Circuit Court of Appeals decided a federal question in conflict with applicable decisions of this Court when it stated:

> "Rather, we think the agreement was merely recognition or confirmation of the general understanding that the position of Agent-Yardmaster at Wichita was an official position not covered by the working agreement."

If this were true, then the ICC ruling under ExParte 72, 'Routine Duties', would be of no avail or applicable

to any employee and the defendant employer could at will abolish a position such as Yardmaster and not abolish the duties of the same, requiring the employee to still perform all of the duties as he had in the past, and therefore, defeat the very intents, purposes and requirements of the Railway Labor Act. This, petitioner believes, is in direct conflict with the decisions as set forth in *Elgin, Joliet & Eastern Ry. Co. v. Burley,* supra. The Court further states:

> "The Act does not interfere with the normal right of the employer to select its employees or discharge them, or to create and abolish positions, so long as it does not impair the collective bargaining process." R. 119.

This, we agree with, but the petitioner herein was discharged not in accordance with the procedure of Article 12 of the collective bargaining agreement of June 1, 1944 but arbitrarily discharged without any hearing of any character as provided under 'Grievance and Discipline' in said Article. The Court further stated:

> " . . . agreement effective January 1, 1938, specifically recognized the right of the Company to 'establish and abolish' the position of yardmaster at any point on the system."

This petitioner, agrees with the said Court in this respect, however, that very agreement stated in Article 13 the manner in which to proceed to abolish the said Yardmaster job, which procedure and manner was not complied with by said Company. The Court further states:

> "It is suggested that Section 6 of the Railway Labor Act requires such notice, (Title 45 U. S. C.

A., Para. 156), but that Section providing for a thirty day written notice by carriers and representatives of an intended change in agreements affecting rates of pay, rules or working conditions, obviously has reference to matters affecting the collective bargaining process, and does not relate *to matters lying outside of its scope.*"

If this be the case as the court has stated, then the rule in *Elgin, Joliet & Eastern Ry. Co. v. Burley,* supra, applies definitely in that the Court above refers to major disputes while the petitioner herein pursues his course upon a minor contention, involving individual employment contract and grievance. Therefore, the petitioner believes in the above cited case, as a matter of law, he should have been given the *personal right to be made a party to negotiations of collective agreement of February 3, 1939* and opportunity *to ratification and to agree or approve its terms.*

3. Petitioner believes that the Circuit Court of Appeals has so far sanctioned the departure by a lower court as to call for an exercise of this Court's power of supervision over the findings and opinion of the said court. The Court of Appeals opinion states, R. 120:

> "While the 1938 agreement was in force and effect, the Company elected to abolish the position of yardmaster at Wichita, and to create the position of agent-yardmaster there, with an official status not within the collective bargaining agreement. The appellant accepted the position of agent-yardmaster at Wichita, and assumed the duties, with the express understanding that it called for a twelve hour day, without automobile expenses."

The District Court found that plaintiff, Beeler, *would not be allowed an expense account for use of his automobile,*

Para. 9, R. 16, and rendered judgment, R. 17, contrary to that finding. The Court of Appeals found no evidence relative to automobile expense, which is contrary to the finding of the District Court, Para. 9, R. 16 and other evidence at R. 32, 33. In the first place, the Agent-Yardmaster job, was result of an order in December, 1937, by officials of defendant railroad, Mr. Franklin and Mr. Brown, R. 25. This was also substantiated by Mr. Mallery and never contradicted in his testimony. Therefore, when the company elected to abolish the position of Yardmaster at Wichita, it had the proper procedure to pursue before it could be abolished, that is, the collective bargaining agreement then in force, on January 1, 1938. It must be remembered that for *thirteen months the petitioner worked under the original oral order of 1937* as Agent-Yardmaster up to the pretended abolishment of the job on February 3, 1939. The appellant, this petitioner, was ordered to take over the position of Agent-Yardmaster, in December, 1937 and was assigned Yardmaster duties. The twelve-hour day he necessarily performed by reason of the written assignment of January 1, 1938 which not only set forth the twelve hours he was to work but also the salary he was to receive and the duties to which he was assigned, that of Yardmaster at Cline Yard, all of which are set out in Plaintiff's Exhibit 3, R. 87. The official status was never added to the Agent-Yardmaster position nor was it indicated in the employment form — G126, Defendants' Exhibit D, R. 95, 96, which set forth the regular form of employment of Beeler by said defendants, giving the reason, it was effective January 1, 1938, on account of regular Agent A. Lusk, retiring, and executed at Wichita, Kansas on January 3, 1938, Defendants' Exhibit D, R. 95. This employment form, signed

by Mr. Beeler, never made any reference that the Agent-Yardmaster job at Wichita was to be a position of official status, not within the collective bargaining agreement. In fact, the petitioner Beeler, signed the application as "Subordinate employing officer." This appellant, petitioner herein, was subject to the May 20, 1944 collective bargaining agreement, effective June 1, 1944, for the reason that he believes the February 3, 1939 collective bargaining agreement is void, of no force and effect relative to rates of his pay, hours of service and working conditions, as established by his assignment, January 1, 1938. Petitioner further believes that at the time of the pretended abolishment of the Yardmaster position under the collective bargaining agreement of February 3, 1939, that due to petitioner's long years of seniority, he should have been given the opportunity to displace a junior Yardmaster in the terminal and if none was available, he would at least have had the right under the Railway Labor Act to have the determination of his particular status established at that time. The Court of Appeals states:

> "Of course the Company could not abolish the job of yardmaster *by merely changing the title"*, R. 120.

This follows in a measure our contention. In view of the fact that there was an understanding between Franklin and Brown of the defendant employer and the petitioner Beeler, that he was to continue to perform all the duties of Yardmaster as he had in the past at $280.00 per month and receive $20.00 additional pay for the added duties of Freight Agent, Mr. Beeler having been in the same office as the Freight Agent at Wichita for many years.

Another important factor of this law suit hinges on the point set forth in the opinion of the Circuit Court of Appeals, R. 120:

> "Section 1(5) of the Railway Labor Act (Title 45 U. S. C. A. 151 (5)), provides that the term 'employee' as used in the Act includes every person in the service of a carrier who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission then in effect, and as may be amended or interpreted by further orders . . . the Interstate Commerce Commission on February 5, 1924, entered ExParte No. 72, in which it undertook to classify supervisory station agents as officials and subordinate officials. The order pertinently provided that supervisory *station agents at large and important stations,* whose duties were *wholly supervisory,* and who were necessarily vested with greater responsibilities than agents classed as subordinate officials, might be designated officials and excluded from the class of subordinate officials."

This finding by the Court of Appeals is definitely contrary to the provisions as set forth in the Act. In ExParte 72, R. 121, the Court has copied in foot notes, ExParte 72, 'Supervisory Station Agents', (a), (b) and (c). Considering the duties of the petitioner Beeler as Agent and Yardmaster, considering that *ten per cent of* all of his duties were *those of Agent* and *ninety per cent of them, Yardmaster,* which is uncontradicted by the evidence of the defendants, and in fact, Mr. Mallery said that it mattered not whether he performed *one hundred per cent Yardmaster, R. 68.* It sets forth (a) Routine Duties, (b) Supervisory Duties and (c) Greater Responsibilities. There is nothing in the testimony of Mr. Beeler or Mr. Mallery which could possibly place

this petitioner under (c) Greater Responsibilities. As a matter of fact, Mr. Mallery, stated in his testimony that Wichita was a large and important station and he contradicted himself by saying that there was only one engine and one crew, that Wichita was not a division point, that it was not a place for breaking up and making up trains, that he was not in charge of the terminal, but his only added duties of supervision were those of Freight Agent, that he was required to perform in addition to his supervisory duties, all of the duties of Yardmaster. This testimony by the defendants' only witness, Mr. Mallery, definitely places the petitioner in classification (a) Routine Duties or (b) Supervisory Duties. The Routine Duties are described as follows:

> "Supervisory station agents who, in addition to their supervisory duties (Freight Agent's duties), are required to perform work usually performed by telegraphers, telephone operators, ticket seller, bookkeepers, towermen, levermen, or similar routine duties (Yardmaster) are employees and, although they may have supervision over one or more station employees, cannot be properly designated subordinate officials."

(b) Supervisory Duties, set forth:

> "Except those referred to in the next succeeding paragraph (Greater Responsibilities) *supervisory station agents* (Freight Agent), whose duties are *wholly supervisory* and *who are not required to perform routine office work* (Yardmaster), as outlined in the preceding paragraph, *are designated as subordinate officials.*"

It is therefore, considered by this petitioner that in view of the ruling of the Interstate Commerce Commission,

that there could be no manner in which the petitioner, Beeler, could be classified as an official under the Interstate Commerce Commission rulings of February 5, 1924, entered as ExParte 72, ICC Annotated, Vol 4, page 3374. The Circuit Court of Appeals has substantially held the same as the lower court which has so far departed from the proper interpretation of employee and subordinate official that this petitioner believes it is inconsistent with the ICC Act and rulings thereunder. He does believe this court should exercise the power of supervision requiring this interpretation and rule that inasmuch as Beeler, was supervising the Freight Agent's office force, and in addition to these supervisory duties, was required to perform all of the routine duties of Yardmaster, which he had performed for twenty-nine years previous, that petitioner Beeler would be defined under said Section, an employee of the defendant employer on June 17, 1946, and at the most a subordinate official; but in both cases, he would still be subject to collective bargaining agreement effective June 1, 1944. It is therefore believed by this petitioner that the Circuit Court of Appeals has gone far in its opinion, to contradict and conflict with the intents and purposes and requirements of the Railway Labor Act, as amended in 1934.

4. In this case, the petitioner insists that his individual employment contract with the defendant employer, which he was ordered to take in December, 1937, as Agent-Yardmaster was a contract as between individual and employer and not as collective bargaining contract, as Mr. Mallery states when he says the collective bargaining agreement of February 3, 1939, R. 64. As the Circuit Court of Appeals stated:

> "It, however, specifically recognizes the right of an individual employee to confer with the manage-

ment concerning matters of individual interest, and *the bargaining representative is not authorized to bind the individual employees* on *matters outside the scope of the collective interest.*" R. 118

The defendant employer on February 3, 1939, sought to bargain collectively with the representative of the union, Mr. Mielke, and certainly such negotiations with the bargaining representative was not authorized to bind the individual employee, Beeler, on matters outside the scope of collective interest. Therefore, there can be only one determination and that is, that the collective bargaining agreement of February 3, 1939, was void and of no effect, as to the individual contract of employment of the petitioner Beeler. By reason of this pretended abolishment, the seniority rights of the petitioner would be of no avail at Wichita and petitioner at that time was being carried on seniority roster at Wichita as Yardmaster with date of January, 1, 1907, Plaintiff's Exhibit 4, R. 88. A seniority right is a personal property right under due process and therefore, since the defendant employer or the representative of the union did not concede to this petitioner, the right to enter into the negotiations with them relative to his position of Yardmaster at Wichita, they took from this petitioner, without due process of law, in substance, his seniority, which is a personal property right and therefore, acted contrary to due process under the Fifth Amendment of the Constitution of the United States. The Court has stated:

"An employee's seniority rights, although arising under collective bargaining agreement between employee union and employer are individual employee's exclusive property and constitute property within the Fifth Amendment to the Constitution of

the United States." *Primakow v. Railway Express Agency,* 56 F. Supp. 413.

CONCLUSION

In conclusion, this petitioner believes that his petition for writ of certiorari should be reviewed and duly certified to the Supreme Court of the United States for determination, by reason of the fact: (a) That the collective bargaining agreement of February 3, 1939 is null and void; (b) That the collective bargaining agreement of June 1, 1944, is inconsistent with the aims, intents, purposes and requirements of the Railway Labor Act, as amended in 1934 and Interstate Commerce Commission rulings, ExParte 72; (c) That petitioner has never been an official as determined by the Act, that his duties of employment both as Agent and as Yardmaster show conclusively that petitioner is an employee and not an official, and therefore, subject to collective bargaining agreement on date of his discharge, June 17, 1946; (d) It is further shown that petitioner has made a prima facie case in accordance with the decisions of this Court, as set forth in *Hanks v. Del. & H. Ry. Co.,* 63 F. Supp. 161 and; (e) Petitioner has further shown that there has been a breach of agreement by defendant employer under Article 12 of the collective bargaining

agreement of June 1, 1944 and by reason thereof, petitioner, as employee is entitled to damages for wrongful discharge, and loss of salary of employment or in lieu thereof, the life expectancy at 65 of the petitioner at 11.10 years, and his overtime from June 1, 1944 to June 17, 1946 at the minute rate of time and one half.

Respectfully submitted,

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